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No. 86-105

In the Supreme Court of the United States

OCTOBER TERM, 1986

JAMES FOSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner's conviction for attempted tax evasion, which was based in part on his filing of false employee withholding allowance certificates, was foreclosed by the misdemeanor provision specifically addressed to the filing of false withholding information.

2. Whether the evidence was sufficient to support petitioner's conviction for tax evasion.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A12) is reported at 789 F.2d 457.

JURISDICTION

The judgment of the court of appeals was entered on April 10, 1986. A petition for rehearing and suggestion for rehearing en banc was denied on May 23, 1986 (Pet. App. C1). The petition for a writ of certiorari was filed on July 22, 1986. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a bench trial in the United States District Court for the Northern District of Illinois, petitioner was convicted on two counts of willfully attempting to evade income taxes for the years 1981 and 1982, in violation of 26 U.S.C. 7201;[1] four counts of willfully failing to file an income tax return for the years 1979 through 1982, in violation of 26 U.S.C. 7203; and one count of willfully filing a false employee withholding allowance certificate (Form W-4) in 1982, in violation of 26 U.S.C. 7205 (Pet. App. A1, A2). Petitioner was sentenced to a total of 18 months' imprisonment. The court of appeals affirmed (Pet. App. A1-A12).

The evidence at trial, which is summarized in the court of appeals' opinion (Pet. App. A1-A2), established that petitioner sought to evade taxes by, inter alia, supplying false and fraudulent employee withholding allowance certificates to his employer, failing to file tax returns, and failing to pay taxes that were due and owing. Petitioner filed yearly income tax returns before 1979 and filed accurate W-4 forms with his employers before 1980. For the years 1979, 1980, 1981, and 1982, he filed no tax returns, although he had income in each of those years in excess of the amount requiring him to file a return. In January 1981, petitioner filed a W-4 form with his employer falsely claiming exemption from withholding. After the IRS instructed petitioner's employer to disregard his claim of exempt status and to continue withholding a portion of his wages, petitioner wrote two letters to his employer demanding that his claim of exempt status be honored (*id.* at

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[1] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1954 (26 U.S.C.) as amended.

A2). Following his filing of a second W-4 form in February 1982, in which he falsely claimed exemption from withholding, petitioner's employer stopped withholding taxes from his wages (*ibid.*).

ARGUMENT

1. Petitioner claims (Pet. 9-11) that his convictions for attempted tax evasion, which were based in part on his filing of false and fraudulent employee withholding allowance certificates, must be set aside because the filing of such a certificate may not be relied upon to establish a violation of the tax evasion statute, 26 U.S.C. 7201. The court of appeals correctly rejected that claim. Because the court's decision is not in conflict with the decision of any other circuit, and because it is based on a statutory provision that was repealed in 1984, further review by this Court is not warranted.

Section 7201 provides, in pertinent part (emphasis added):

> Any person who willfully attempts *in any manner* to evade or defeat any tax imposed by this title or the payment thereof shall, *in addition to other penalties provided by law*, be guilty of a felony * * *.

The language of Section 7201 is clearly broad enough to reach an attempt to evade tax by filing false employee withholding allowance certificates. In *Spies* v. *United States*, 317 U.S. 492, 499 (1943), this Court refused to "constrict the scope of the Congressional provision that * * * [an attempt to evade tax] may be accomplished 'in any manner.'" Instead, the Court held that an affirmative willful attempt may be inferred from "any conduct, the likely effect of which would be to mislead or conceal." *Ibid.* In the

absence of any express statutory restriction, the filing of a certificate with one's employer falsely claiming to be exempt from tax in order to stop the employer from withholding taxes would clearly constitute such conduct.

Petitioner argues, however, that such an explicit restriction appears in the language of the prior version of 26 U.S.C. 7205, which was applicable to petitioner's offenses. That version of Section 7205 made it a crime willfully to file a false and fraudulent employee withholding allowance certificate, and it further provided that the sanction for a violation of that section should be "in lieu of any other penalty provided by law."[2] As the court of appeals noted (Pet. App. A7-A8), the legislative history of Section 7205 does not support petitioner's attempt to restrict the broad reach of Section 7201.

The language "in lieu of any other penalty provided by law" was added to Section 7205 by Section 2(a) of the Current Tax Payment Act of 1943, ch. 120, 57 Stat. 138, codified at 26 U.S.C. 1626(d) (1939 Code). The legislative history of that statute explained that the penalties imposed by the prohibition against false withholding statements were intended to be "in lieu of those provided in section 145

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[2] For violations occurring after July 18, 1984, Congress has amended Section 7205 to provide that its penalties shall be "in addition to" any other penalty provided by law. Pub. L. No. 98-369, Section 159(a), 98 Stat. 696. The amendment was enacted in response to *United States* v. *Williams*, 644 F.2d 696, 700 (8th Cir.), cert. denied, 454 U.S. 841 (1981), where the court held that Congress intended the filing of a false W-4 form to be punished solely under Section 7205 and did not intend that such conduct could serve as the basis for a prosecution under 26 U.S.C. 7212 (endeavoring to obstruct the due administration of the Internal Revenue Code).

(a) of the code." S. Rep. 221, 78th Cong., 1st Sess. 31 (1943). Section 145(a) of the 1939 Internal Revenue Code was a misdemeanor penalizing the failure to file returns, submit information, or pay tax; it was the predecessor to Section 7203 of the 1954 Code. The legislative history did not indicate that Congress intended to erect a bar to prosecutions under Section 145(b), the 1939 predecessor to Section 7201. When Section 1626(d) was moved to Section 7205 in the 1954 Code, the legislative history noted that no change was intended from existing law. S. Rep. 1622, 83d Cong., 2d Sess. 602 (1954). Thus, as the court of appeals concluded (Pet. App. A7), "it appears that Congress intended a conviction for filing a false W-4 form to be in lieu of other misdemeanors involving filing but not in lieu of the felony offense of attempting to evade the income tax." Consequently, the language "in lieu of any other penalty provided by law" cannot be read as petitioner contends it should be. There is therefore no merit to petitioner's claim that his conviction for attempted tax evasion, which was based in part on his filing of false W-4 forms, was foreclosed by the limiting language of Section 7205.

Contrary to petitioner's claim, there is no conflict between the decision of the Seventh Circuit in this case and the decision of the Eighth Circuit in *United States* v. *Williams*, 644 F.2d 696, cert. denied, 454 U.S. 841 (1981). The court in *Williams* held that the filing of a false withholding statement did not constitute a violation of 26 U.S.C. 7212, the misdemeanor provision prohibiting obstruction of the due administration of the Internal Revenue Code. The *Williams* case did not involve Section 7201, the broad felony provision prohibiting attempts to evade

or defeat the payment of any tax. Moreover, the Section 7201 counts in this case were not based solely on petitioner's filing of false withholding statements; those filings were simply part of the evidence of petitioner's intention to evade the payment of taxes. Therefore, even if it was proper to construe the language of the prior version of Section 7205 to bar the use of a false withholding statement as the basis for a prosecution under a different tax misdemeanor provision, that would not require that the evidence of the false statement be excluded in a prosecution for tax evasion.

In any event, this issue is of no continuing importance. The 1984 amendment to Section 7205 eliminated the language on which petitioner relies and expressly provided that the penalties in that section are "in addition to" any other penalty provided by law. See note 2, *supra*. Any doubt that may have been created by the prior version of Section 7205 has thus been conclusively resolved by Congress for all post-1984 conduct. The alleged conflict between this case and the *Williams* decision therefore does not warrant review by this Court.

2. a. Petitioner contends (Pet. 11-17) that the evidence was insufficient to support his conviction of attempted tax evasion, because the filing of a false and fraudulent employee withholding allowance certificate does not constitute an affirmative act of evasion in violation of 26 U.S.C. 7201. The court of appeals properly rejected that argument (Pet. App. A9).

The courts that have addressed the issue have agreed that a willful failure to file a tax return and to pay the tax, coupled with the filing of a false withholding certificate, constitutes an attempt to evade or defeat taxes in violation of 26 U.S.C. 7201.

United States v. *Copeland*, 786 F.2d 768 (7th Cir. 1986); *United States* v. *House*, 617 F. Supp. 240, 243 (W.D. Mich. 1985), aff'd, 787 F.2d 593 (6th Cir. 1986) (Table). See also *Zell* v. *Commissioner*, 763 F.2d 1139, 1146 (10th Cir. 1985) (filing a false W-4 form is an "affirmative act" sufficient to justify the fraud penalty). The elements of willfully attempting to evade or defeat a tax are (1) the existence of a tax deficiency, (2) an affirmative act constituting an evasion or attempted evasion of the tax, and (3) willfulness. *Sansone* v. *United States*, 380 U.S. 343, 351 (1965). When a taxpayer has willfully failed to file a tax return in violation of Section 7203, his prior, concurrent, or subsequent making of a false statement relating to his tax liability satisfies the requirement of an affirmative act and elevates the Section 7203 misdemeanor to a Section 7201 felony. *United States* v. *Copeland*, 786 F.2d at 770; *United States* v. *Goodyear*, 649 F.2d 226, 228 (4th Cir. 1981). See also *United States* v. *Stone*, 702 F.2d 1333, 1338 (11th Cir. 1983) (the affirmative act need be nothing more than the filing of a false and fraudulent tax return). Thus, petitioner's filing of false and fraudulent withholding allowance certificates was sufficient to permit his prosecution and conviction for tax evasion.

It does not matter that such a filing is itself a misdemeanor. *United States* v. *Copeland*, 786 F.2d at 770. See *Sansone* v. *United States*, 380 U.S. at 351. In *Spies* v. *United States*, 317 U.S. at 497, the Court described Section 7201 as "the capstone of a system of sanctions which *singly or in combination* were calculated to induce prompt and forthright fulfillment of every duty under the income tax law * * *" (emphasis added). As the Court explained (317 U.S. at 497, 499 (emphasis added)):

> A felony may, and frequently does, include lesser offenses in combination either with each other or with other elements. We think it clear that this felony [a violation of Section 7201] may include one or several of the other offenses against the revenue laws. * * *
>
> * * * * * *
>
> Willful but passive neglect of the statutory duty may constitute the lesser offense, but to combine with it a willful and positive attempt to evade tax *in any manner or to defeat it by any means* lifts the offense to the degree of a felony.

Thus, the filing of a false withholding allowance certificate, though itself an offense under the Internal Revenue Code, may be alleged and proved as the means of attempting to evade tax.[3]

In any event, the false W-4 forms were not the only evidence offered to support the tax evasion charges. On both tax evasion counts, the government introduced evidence that, in addition to filing false W-4 forms, petitioner directed correspondence to his employer instructing it to honor his false W-4 forms and to stop withholding (Pet. App. A4, D3-D6). That correspondence was sufficient, by itself,

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[3] Equally without merit is petitioner's assertion (Pet. 14) that he was improperly convicted of violating Section 7201 because his filing of false W-4 forms did not mislead the Internal Revenue Service or his employer. Section 7201 punishes the attempt to evade the tax. It does not matter that the likelihood of success is small or that no one is misled: it is enough that petitioner acted with the requisite intent. Cf. *United States* v. *Lawson*, 670 F.2d 923, 928 (10th Cir. 1982) (Section 7205 prohibits the willful furnishing of false or fraudulent withholding information to an employer; the test is not whether the employer or the government was, or could have been, deceived).

to satisfy the requirement that the proof in a Section 7201 prosecution show an affirmative act of tax evasion. See *United States* v. *Beacon Brass Co.*, 344 U.S. 43, 45-46 (1952); *Spies* v. *United States*, 317 U.S. at 499. Thus, petitioner's conviction of tax evasion could have been sustained quite apart from his submission of false W-4 forms.

b. Finally, petitioner contends (Pet. 17-20) that the court of appeals erred in applying an objective standard to his conduct in determining the sufficiency of the government's proof of willfulness. Petitioner further contends that the Seventh Circuit's decision is contrary to decisions of other circuits that require proof of subjective intent to violate the tax laws. See, *e.g.*, *United States* v. *Aitken*, 755 F.2d 188 (1st Cir. 1985). The alleged conflict is not squarely presented in this case, since the district court found that petitioner subjectively intended to violate the law,[4] and since the court of appeals found the evidence to

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[4] The district court found that petitioner knew he was required by law to file income tax returns and that he willfully failed to do so. It also found that petitioner had filed false W-4 forms knowing them to be false, and that his overall purpose was to evade taxes (Tr. 156-157). At sentencing, the court underscored its finding of willfulness (Sent. Tr. 16-18):

> I found that he did not believe that those arguments [that wages are not income and that the tax laws did not apply to him] were valid. What he believed was that by advancing those arguments, he might be able to create a sufficient doubt of his willfulness that he would be able to defeat a prosecution for either a wilful failure to file tax returns or a wilful evasion of taxes or a wilful attempt to evade taxes. * * * And no reasonable or unreasonable person can have the least good faith belief at this late stage of the matter in the validity of such arguments. This defendant had no such belief.

be sufficient under either an objective or a subjective test.

As evidence of petitioner's subjective awareness of the law, the court of appeals pointed to his prior history of filing accurate returns and withholding certificates (see *United States* v. *Shields*, 642 F.2d 230, 231 (8th Cir.), cert. denied, 454 U.S. 848 (1981)), the notifications he received from the IRS concerning his tax liability (see *United States* v. *Green*, 757 F.2d 116, 123-124 (7th Cir. 1985); *United States* v. *Grumka*, 728 F.2d 794, 797 (6th Cir. 1984)), and the tax protester materials he sent to the IRS and to his employer (see *United States* v. *Reed*, 670 F.2d 622, 623 (5th Cir.), cert denied, 457 U.S. 1125 (1982)). Petitioner never asserted that he did not act voluntarily or intentionally. Rather, his sole claim throughout these proceedings has been that he did not know the requirements of the law—*i.e.*, that he was required to file tax returns, that he was not entitled to claim exemption from tax withholding, and that he owed a tax. The evidence introduced at trial and relied upon by the court of appeals was clearly sufficient to sustain the inference that petitioner was aware of the requirements of the law.[5]

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[5] In any event, it is not clear that the circuits are in conflict, as petitioner claims, because the law within the Seventh Circuit is still in a state of flux. In *United States* v. *Bressler*, 772 F.2d 287, 290 & n.1 (1985), cert. denied, No. 85-734 (Jan. 21, 1986) the Seventh Circuit noted that the defense of good faith misunderstanding of law "still appears to depend on objective reasonableness in this Circuit," but the court acknowledged apparently contrary authority within the circuit (see *United States* v. *Dack*, 747 F.2d 1172, 1175 (7th Cir. 1984); *United States* v. *Walsh*, 627 F.2d 88, 92-93 (7th Cir. 1980)).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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